

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

RALPH NADER, et al.,

Plaintiffs

v.

**DEMOCRATIC NATIONAL COMMITTEE,
et al.**

Defendants.

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Civil Action No. 07-2136-RMU

**PLAINTIFFS' RESPONSE IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS**

INTRODUCTION

Defendants Democratic National Committee (DNC) (together with Defendants Mark Brewer and Jack Corrigan), the Kerry-Edwards Campaign (together with Defendant John Kerry), The Ballot Project (together with Defendants Toby Moffett, Elizabeth Holtzman and Robert Brandon), Reed Smith, LLP, Service Employees International Union (SEIU) and America Coming Together (ACT) have each filed separate motions to dismiss Plaintiffs' Amended Complaint. For the sake of efficiency and as a convenience to the Court, Plaintiffs address all of Defendants' arguments in this one Response in Opposition. Specifically, Plaintiffs' Response in Opposition addresses the following questions raised by Defendants: 1) whether Plaintiffs state a claim for civil conspiracy; 2) whether Plaintiffs state claims for abuse of process and malicious prosecution; 3) whether the statute of limitations bars Plaintiffs' claims; 4) whether the

Noerr-Pennington doctrine bars Plaintiffs' claims; 5) whether the *Rooker-Feldman* doctrine bars Plaintiffs' claims; 6) whether Plaintiffs have standing to bring their claims; and 7) whether Plaintiffs' request for injunctive relief is moot. To the extent that each Defendant raises unique facts, issues or defenses, Plaintiffs address them individually, within the appropriate section.

FACTUAL BACKGROUND

Plaintiffs' Amended Complaint alleges that Defendants unlawfully conspired to prevent Ralph Nader and Peter Miguel Camejo (hereinafter, "Nader-Camejo") from running for President and Vice President of the United States, respectively, during the 2004 General Election, in an effort to help Democratic candidates John Kerry and John Edwards win that election by denying voters an alternative choice at the polls. In furtherance of this conspiracy, Defendants jointly planned and executed a nationwide assault of unfounded and abusive litigation against the Nader-Camejo Campaign, pursuant to which conspirators filed twenty-four complaints in eighteen state courts and five complaints before the Federal Election Commission (FEC), all within a twelve-week period between June and September of 2004. The purpose of these complaints was not to vindicate valid legal claims, but rather to use the sheer burden of repetitive and abusive litigation as a means to drain and distract the Nader-Camejo Campaign in the months immediately preceding the election, and to restrain Nader-Camejo from running for public office, *in spite of their qualification* for such office, and *with reckless disregard for their rights* under state and federal law.

The DNC directed Defendants' conspiracy in conjunction with the Kerry-Edwards Campaign and The Ballot Project, a Section 527 organization that Defendants

incorporated specifically for the purpose of coordinating and financing their litigation against Nader-Camejo. Am. Comp. ¶ 5. At least ninety-five lawyers from fifty-three law firms eventually joined Defendants’ litigation nationwide. The DNC, its state Democratic Party affiliates and The Ballot Project collectively paid these firms nearly \$1 million, while the firms contributed in excess of \$2 million more in *pro bono* legal services. *Id.* at ¶ 61. Much of this activity violated federal election law.¹

Defendants conceived their abusive litigation strategy with wrongful intent, before they could possibly have any basis to form probable cause for their claims. In February 2004, before Mr. Nader had even announced his candidacy, then-Chairman of DNC Terry McAuliffe declared, “We can’t afford to have Ralph Nader in the race.” *Id.* at ¶ 2. Thus, when Mr. Nader announced his candidacy soon thereafter, Defendants resolved to sue him as many times in as many states as possible. *Id.* at ¶¶ 45-47. “We wanted to neutralize his campaign by forcing him to spend money and resources defending these things,” The Ballot Project president Toby Moffett explained during the election, “but much to our astonishment we’ve actually been more successful than we thought we’d be in stopping him from getting on at all.” *Id.* at ¶ 62. After the election, Defendant Moffett reaffirmed Defendants’ unlawful intent. “We had a role in the ballot challenges,” Mr. Moffett said. “We distracted him and drained him of resources. I’d be less than honest if I said it was all about the law. It was about stopping Bush from getting elected.” *Id.* at ¶ 62.

¹ The Federal Election Campaign Act prohibits donations to federal election campaigns from corporations, including “in kind” donations of legal services from incorporated law firms. *See* 2 U.S.C. 441b; FEC Advisory Opinion 2006-22. Plaintiffs are preparing a complaint that sets forth the violations of federal election law arising from Defendants’ unlawful conspiracy, and will file a copy with the Court once the complaint is duly filed with the FEC.

In states where litigation alone would be insufficient to accomplish their goals, Defendants orchestrated campaigns of harassment, intimidation and sabotage, with the specific intention of preventing Nader-Camejo from complying with state election laws, and to manufacture grounds for Defendants' subsequent litigation. These unlawful tactics proved to be decisive to Defendants' success. Defendants ultimately prevailed in court in only four states – Illinois, Ohio, Oregon and Pennsylvania – and in three of these states, unlawful acts of harassment, intimidation or sabotage directly obstructed or significantly impeded Nader-Camejo's efforts to gain ballot access. *Id.* at ¶¶ 67-71.

Although the great majority of Defendants' lawsuits failed, their conspiracy nevertheless succeeded, by draining the Nader-Camejo Campaign of resources, denying Nader-Camejo ballot access in several states, and denying Plaintiff-voters the choice of voting for them. Defendants' conspiracy did not end there, however. To this day, Defendants' abusive litigation against Mr. Nader remains ongoing, in the form of attachment proceedings initiated in the District of Columbia Superior Court to seize \$61,638.45 from his personal accounts. *Id.* at ¶¶ 202-03. Defendant Reed Smith, which nominally represented eight voters who sued to remove Nader-Camejo from Pennsylvania's ballot, now seeks to enforce a judgment that appears to be unprecedented in the history of American jurisprudence, ordering Nader-Camejo to pay \$81,102.19 in litigation costs.² Indeed, the judgment functions much like a poll tax, effectively penalizing Nader-Camejo for attempting to run for office, just as poll taxes once penalized voters for attempting to vote. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll tax of \$1.50). Moreover, as discussed *infra*, the judgment

² *See In re Nomination Paper of Ralph Nader*, 905 A.2d 450 (Pa. 2006).

was procured by means of a fraud upon the court, and cannot be enforced consistent with basic principles of due process.³

Reed Smith purports to be acting on behalf of its nominal clients, but Defendant DNC retained the firm during the 2004 General Election, and Defendant John Kerry and his wife Teresa Heinz Kerry are important clients. Am. Comp. ¶ 204. It simply is not plausible, therefore, that Reed Smith undertook litigation against Nader-Camejo on behalf of eight Pennsylvania voters, and pursued it to such unprecedented extremes, without the knowledge and consent of its co-Defendant clients *who were engaged in similar litigation against Nader-Camejo in other states*. *Id.* at ¶¶ 56-59. Rather, Reed Smith's effort to seize \$61,638.45 from Mr. Nader's personal accounts is just what it appears to be: an ongoing act in furtherance of Defendants' conspiracy to abuse judicial processes for the improper purpose of causing Nader-Camejo financial injury and other damages.

The allegations in Plaintiffs' Amended Complaint overwhelmingly support their claim that Defendants engaged in such a conspiracy. A brief but by no means exhaustive summary of these allegations includes the following:

- Defendants formed their unlawful agreement to bring abusive litigation against Mr. Nader before he had even announced his candidacy, and before they could possibly have any basis to form probable cause for such litigation, *id.* at ¶ 45;
- Defendants caused twenty-four complaints to be filed in less than twelve weeks to challenge Nader-Camejo's nomination papers in eighteen states, but did not challenge other candidates' nomination papers, because they believed that Nader-Camejo presented a unique threat to their preferred candidates, *id.* at ¶¶ 1-3;

³ On November 7, 2007, Mr. Nader filed a motion for relief from the judgment in the Superior Court, setting forth the extraordinary facts that gave rise to the unprecedented judgment. The motion, which remains pending, is attached hereto.

- Defendant DNC’s former Chairman Terry McAuliffe declared, “We can’t afford to have Ralph Nader in the race,” and made public and private requests that Mr. Nader either drop out or campaign only in so-called “safe” states *id.* at ¶ 2-3;
- Defendant DNC solicited, financed and coordinated Defendants’ litigation against Nader-Camejo, even though DNC officials had no reason to believe such litigation was proper or warranted, *id.* at ¶¶ 1, 61, 118;
- Defendants recruited at least ninety-five lawyers from fifty-three law firms to join their litigation against Nader-Camejo, and dedicated at least \$3 million in financial and other resources to the effort, a massive mobilization of resources that was clearly excessive merely to ensure Nader-Camejo’s compliance with state election laws, *id.* at ¶ 61;
- Defendants incorporated a Section 527 organization called The Ballot Project, Inc., for the sole purpose of coordinating and financing litigation against Nader-Camejo, and no other candidates, *id.* at ¶ 5;
- Defendant Toby Moffett, who was president of The Ballot Project, made numerous statements confirming that Defendants initiated their litigation against Nader-Camejo with wrongful intent and for an improper purpose:
 - “This guy is still a huge threat. We’re just not going to make the same mistake we made in 2000,” *id.* at ¶¶ 51;
 - “We’re not going to let him do it again,” *id.* at ¶¶ 48;
 - “We’re doing everything we can to facilitate lawyers in over 20 states,” *id.* at ¶ 60;
 - “We wanted to neutralize his campaign by forcing him to spend money and resources defending these things, but much to our astonishment we’ve actually been more successful than we thought we’d be in stopping him from getting on at all,” *id.* at ¶ 62;
 - “We had a role in the ballot challenges. We distracted him and drained him of resources. I’d be less than honest if I said it was all about the law. It was about stopping Bush from getting elected,” *id.* at ¶ 63;
- Defendant The Ballot Project retained lawyers or law firms that sued Nader-Camejo in Illinois and Florida (and reimbursed expenses for lawyers or law firms that sued Nader-Camejo in Colorado and Pennsylvania), paying them nearly \$180,000, *id.* at ¶¶ 86, 99, 205;

- Defendant DNC retained law firms that sued Nader-Camejo in Maine, Mississippi, Ohio and Pennsylvania (and reimbursed expenses for lawyers who participated in Defendants’ Florida litigation), paying them nearly \$500,000, even though DNC officials explicitly denied that the DNC had done so, *id.* at ¶¶ 57, 61, 64, 120, 130, 165, 205;
- Defendant DNC official and Maine Democratic Party Chair Dorothy Melanson testified under oath that DNC officials directed her to sue Nader-Camejo in Maine, hired her law firm, and expected her to report directly to them regarding the lawsuit’s outcome, even though DNC officials explicitly denied that the DNC had done so, *id.* at ¶ 118;
- Defendant DNC officials affiliated with state Democratic Parties initiated litigation against Nader-Camejo in six states, and were connected to litigation in four more, *id.* at ¶ 56;
- Defendant Kerry-Edwards 2004, Inc. directly participated in Defendants’ litigation against Nader-Camejo, and Kerry-Edwards Campaign staff drafted at least one complaint that conspirators filed against Nader-Camejo, even though Defendant John Kerry expressly disavowed that his campaign would participate in Defendants’ litigation, *id.* at ¶¶ 59, 65, 138, 140;
- Defendants and their co-conspirators made numerous statements confirming that their intention was *not* merely to ensure that Nader-Camejo complied with state election laws, but rather to ensure that Nader-Camejo failed to gain ballot access in their states:
 - “If we think it gets to a point where we need to step in and mobilize to make sure he doesn’t get on the ballot, then we will,” (spokeswoman for Defendant America Coming Together), *id.* at ¶ 166;
 - “We are being completely open about our intentions. Our goal is to help elect John Kerry the next president of the United States,” (Pennsylvania House Minority Leader H. William DeWeese), *id.* at ¶ 182.

Plaintiffs further allege that email records from Defendant DNC, email records from Defendant Kerry-Edwards 2004, Inc., official records of court proceedings and official records on file with the FEC and the IRS confirm Plaintiffs’ allegations. In face of such comprehensive, specific and well-documented allegations, Defendants nevertheless insist that their conduct was not unlawful. Defendants did not *intend* to

abuse judicial processes for the improper purpose of inflicting damages upon Nader-Camejo and preventing the candidates from running for public office, they claim, but rather, Defendants merely intended to ensure that their competitors complied with state election laws. Insofar as Defendants urge the Court to accept this alternative “natural explanation” for their unlawful conduct, however, they simply deny allegations that must be taken as true at this stage of the proceedings. *See Zinerman v. Burch*, 494 U.S. 113, 118 (1990). Significantly, Defendants do not deny that their conspiracy *as alleged by Plaintiffs* was unlawful, but only that they did not *in fact* engage in such conspiracy. Defendants’ principal “argument” is therefore insufficient as a matter of law to sustain their motions to dismiss.

The weakness of Defendants’ position is particularly evident from their undue reliance on a case that simply is not relevant to the case at bar. In a transparent effort to divert the Court from the merits of *this case*, Defendants hope to persuade the Court that Plaintiffs’ claims have already been litigated, albeit by *other parties*, in a case previously filed against some of these same defendants. *See Fulani v. McAuliffe*, 2005 U.S. Dist. LEXIS 20400 (S.D.N.Y. 2005). Defendants themselves do not suggest that *Fulani* has any *res judicata* effect on the case at bar, however, and their reliance on that case is neither warranted nor relevant.⁴ *Fulani* nevertheless demonstrates, by way of comparison, the strength of Plaintiffs’ allegations and the merit of their claims, for the entirety of the conspiracy allegation in that case consisted of one sentence asserted “on information and belief.” *See id.* The allegations set forth in Plaintiffs’ Amended Complaint, by contrast, set forth Defendants’ unlawful conspiracy with detailed specificity. Am. Comp. ¶¶ 45-66.

⁴ If anything, that other parties accused Defendants of similar misconduct suggests that Defendants may in fact have engaged in such misconduct.

Finally, the supposedly “natural explanation” that Defendants proffer for their conduct is so *fantastic* and *incredible* that it simply cannot be true. Defendants dedicated millions of dollars in resources, incorporated a Section 527 organization, and recruited a veritable army of lawyers, all for the purpose, they now claim, merely to ensure that Ralph Nader and Peter Miguel Camejo complied with state election laws. This supposedly “natural explanation” is not only absurd on its face, but it also contradicts the numerous statements Defendants made, in which they confirmed that their intent was to bankrupt Nader-Camejo and prevent them from running for office, whether or not the candidates complied with state election laws. Moreover, if Defendants believed that they were engaged in legitimate petitioning activity when they initiated their barrage of complaints against Nader-Camejo, why did they deny and fraudulently conceal their conduct? The answer is obvious: Defendants themselves recognize that such conduct was illicit and that their conspiracy was unlawful.

ARGUMENT

I. Plaintiffs’ Comprehensive and Detailed Allegations Exceed the Liberal Pleading Standard Set Forth Under Fed. R. Civ. P. 8.

In order to state a claim under the liberal pleading standard set forth in Federal Rule of Civil Procedure 8(a)(2), Plaintiffs must provide “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007), quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957). A complaint need not set forth “detailed factual allegations,” but rather, the allegations must be sufficient merely “to raise a right to relief above the speculative level.” *Id.*, citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp.

235-36 (3d ed. 2004). Where a conspiracy is pled, the allegations must suggest only that discovery will reveal evidence sufficient to infer an illegal agreement, but not that the existence of such agreement is probable. *Twombly*, 127 S. Ct. at 1964-65. Once a claim has been stated, therefore, “it may be supported by showing *any set of facts* consistent with the allegations in the complaint.” *Id.* at 1969 (emphasis added).

The stringent standard for evaluating a motion to dismiss a complaint under Rule 12(b) is well settled. The factual allegations set forth in the complaint must be taken as true. *See Zinermon*, 494 U.S. at 118. Furthermore, all reasonable inferences must be drawn in favor of the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Accordingly, provided that a complaint is well-pleaded, a motion to dismiss must be denied, even if it appears “that a recovery is very remote and unlikely.” *Twombly*, 127 S. Ct. at 1965, quoting *Scheuer*, 416 U.S. at 236.

Plaintiffs’ Amended Complaint well exceeds the liberal pleading standard set forth under the Federal Rules of Civil Procedure. Far beyond the minimal requirements of Rule 8, Plaintiffs set forth in comprehensive and specific detail the tortious conduct of Defendants and the resulting injury to Plaintiffs. Because Plaintiffs’ allegations must be taken as true, the only question before the Court on Defendants’ motions to dismiss is whether Plaintiffs would be entitled to relief if they proved these allegations at trial. This question must be answered in the affirmative.

Accordingly, Defendants’ motions to dismiss fail as a matter of law.

II. Plaintiffs State a Claim for Civil Conspiracy.

Defendants argue that Plaintiffs fail to state a claim for civil conspiracy on two grounds. First, Defendants argue that Plaintiffs fail to allege a conspiracy with sufficient

particularity. Second, Defendants argue that Plaintiffs fail to allege underlying wrongful conduct sufficient to support a claim for civil conspiracy. Neither of these arguments has any merit. To state a claim for civil conspiracy, Plaintiffs must allege: 1) an agreement between two or more persons; 2) to accomplish an unlawful purpose or a lawful purpose by unlawful means; and 3) resultant damages to plaintiff. *See Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. App. 2000). Plaintiffs' allegations are clearly sufficient to establish each of these elements.

Plaintiffs allege that the DNC, the Kerry-Edwards Campaign and a Section 527 organization called The Ballot Project orchestrated a nationwide conspiracy to bankrupt the 2004 presidential campaign of Ralph Nader and Peter Miguel Camejo, in an effort to deny voters the choice of voting for them in the 2004 general election. Am. Comp. ¶¶ 45-66. Plaintiffs allege that Defendants and their co-conspirators reached this agreement "after the Democrats' defeat in the 2000 election," which they blamed upon Mr. Nader, and that they agreed to try to prevent him from running again if he announced his candidacy in 2004. *Id.* at ¶ 45. Having reached this agreement, approximately three dozen leaders of the conspiracy "met privately to discuss their plans on July 26, 2004 at the Four Seasons Hotel in Boston." *Id.* at ¶ 46. The Ballot Project's co-directors, Defendants Toby Moffett and Elizabeth Holtzman, attended along with Defendant Robert Brandon, whose offices housed The Ballot Project. *Id.* Defendant DNC paid for the meeting. *Id.*

At the Four Seasons meeting, the conspirators discussed their plan to sue and otherwise obstruct Nader-Camejo in as many states as possible, in an effort "to drain [Mr. Nader] of resources and force him to spend his time and money." *Id.* at ¶ 47 (quoting Defendant Toby Moffett). The Ballot Project was incorporated "specifically for the

purpose of coordinating and financing” this nationwide conspiracy. *Id.* at ¶ 5. Plaintiffs further allege that the aforementioned conspirators later attended the Democratic National Convention, where they distributed a detailed action memo outlining their plan, solicited donations and recruited others into their conspiracy. *Id.* at ¶¶ 49-52. Finally, plaintiffs allege that, in furtherance of the conspiracy, the conspirators filed twenty-four state court complaints and five FEC complaints against the Nader-Camejo Campaign within twelve weeks between June and September 2004, and engaged in numerous acts of harassment, intimidation and sabotage, all of which had the purpose and effect of causing Plaintiffs financial injury and other damages and violating their constitutional rights. *Id.* at ¶¶ 67-232.

Defendants correctly note that a plaintiff cannot merely set forth a formulaic recitation of the elements of a cause of action for conspiracy, but rather must allege enough factual matter to suggest that an agreement was made. Defendants also correctly note that, in order for the conspiracy to be actionable, a plaintiff must allege an underlying unlawful purpose. *See Weishapl v. Sowers*, 771 A.2d 1014, 1023-1024 (D.C. 2001); *Executive Sandwich Shop*, 749 A.2d 724; *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994). Defendants are plainly wrong, however, to suggest that Plaintiffs fail to allege facts sufficient to satisfy their burden. *See id.*

To state a claim for civil conspiracy, Plaintiffs need not allege an express agreement among all co-conspirators, because courts generally infer such agreement from indirect evidence. *See Hobson v. Wilson*, 737 F.2d 1, 54 (D.C. Cir. 1984); *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983). Likewise, Plaintiffs need not allege that each Defendant planned, participated, or even knew about each wrongful act for which they

are to be held liable, but only that Defendants shared “a single plan, the essential nature and general scope of which were known” to them. *Hobson*, 737 F.2d at 51-52; *see Halberstam*, 705 F.2d at 481, 486. This is because, while “the conspiracy is not independently actionable...it is a means for establishing vicarious liability for the underlying tort.” *Halberstam*, 705 F.2d at 479. Plaintiffs therefore satisfy their burden by alleging that Defendants: 1) agreed; 2) to cause financial injury and other damages to Plaintiffs and to violate their constitutional rights by means of groundless and abusive litigation; and 3) that Defendants did in fact cause such harm. Am. Comp. ¶¶ 45-66. Accordingly, Plaintiffs state a claim for civil conspiracy.

Defendants place great emphasis on the common-sense statement in Plaintiffs’ Amended Complaint that the allegations set forth therein “do not *necessarily* apply to every Defendant and every conspirator” named in the complaint. Am. Comp. at ¶ 14. Misreading the plain language of this statement, Defendants claim that Plaintiffs’ allegations *necessarily do not* apply to each named Defendant. Notwithstanding their effort to twist the clear meaning of the words, however, Defendants cannot change the legal standard applicable to civil conspiracies, which holds that all conspirators may be held vicariously liable for all acts in furtherance of the conspiracy. *See generally Halberstam*, 705 F.2d 472. Regardless, Plaintiffs’ allegations clearly suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to each named Defendant, and that is all that Plaintiffs must do to state a claim for conspiracy. *Twombly*, 127 S. Ct. at 1964-65.

A. Plaintiffs Allege Facts Sufficient to State a Claim Against the DNC, Mark Brewer and Jack Corrigan.

Plaintiffs allege that Defendant DNC directed, coordinated and financed Defendants' unlawful conspiracy. Specifically, DNC officials directed state party officials to initiate litigation against Nader-Camejo, and the DNC hired and paid for several state parties' lawyers. In addition, high-level DNC staff, including Jack Corrigan, developed and coordinated the conspiracy's nationwide litigation strategy, while rank-and-file DNC staff helped prepare the conspirators' complaints. On information and belief, the DNC also coordinated with The Ballot Project to secure *pro bono* counsel in other states. Am. Comp. ¶¶ 56-58.

Facts alleged to support these allegations include email records indicating that Jack Corrigan and other DNC staff helped prepare Defendants' complaints, as well as FEC records indicating that the DNC retained several law firms that sued Nader-Camejo in several states, including Maine, Mississippi, Ohio and Pennsylvania. In addition, at least six DNC officials affiliated with state Democratic Parties, including Mark Brewer, filed suit against Nader-Camejo in their own names, while at least four more DNC officials directly participated or were connected to Defendants' litigation. *Id.*

Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to Defendant DNC, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against the DNC. *See Twombly*, 127 S. Ct. at 1964-65.

B. Plaintiffs Allege Facts Sufficient to State a Claim Against The Ballot Project, Elizabeth Holtzman, Toby Moffett and Robert Brandon.

Plaintiffs allege that The Ballot Project directed Defendants' conspiracy in conjunction with the DNC and the Kerry-Edwards Campaign, and that the Section 527 organization was incorporated specifically for the purpose of coordinating and financing

Defendants' litigation against the Nader-Camejo Campaign. Specifically, Plaintiffs allege that The Ballot Project retained Defendants' lawyers or law firms in Florida and Illinois, and that the organization reimbursed costs incurred by Defendants' law firms in Colorado and Pennsylvania. In addition, The Ballot Project recruited lawyers and law firms nationwide to join Defendants' litigation against Nader-Camejo, and successfully solicited more than \$2 million in *pro bono* legal services from such firms. Toby Moffett and Elizabeth Holtzman are directors of The Ballot Project, and Robert Brandon housed the organization in his offices.

Facts alleged to support these allegations include IRS records documenting payments The Ballot Project made to Defendants' law firms in the aforementioned states, as well as numerous statements by The Ballot Project's president, Defendant Toby Moffett, confirming the organization's lead role in orchestrating Defendants' unlawful conspiracy. Am. Comp. at ¶¶ 86, 99, 205.

Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to Defendants The Ballot Project, Toby Moffett, Elizabeth Holtzman and Robert Brandon, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against these parties. *See Twombly*, 127 S. Ct. at 1964-65.

C. Plaintiffs Allege Facts Sufficient to State a Claim Against Kerry-Edwards 2004, Inc. and John Kerry.

Plaintiffs allege that Defendants Kerry-Edwards 2004, Inc. and John Kerry were the primary intended beneficiaries of Defendants' unlawful conspiracy, that John Kerry had personal knowledge of Defendants' conduct on his behalf, and that high level staff from the Kerry-Edwards Campaign directly participated in such conduct, despite Mr.

Kerry's prior claim that they would not. Defendants' unlawful conspiracy was specifically intended to help the Kerry-Edwards Campaign win the 2004 presidential election by using unfounded and abusive litigation to bankrupt their competitors and deny voters an alternative choice at the polls. Judy Reardon, the Kerry-Edwards Campaign's deputy national director for northern New England, drafted at least one of Defendants' complaints, and coordinated with the state Democratic Party officials and attorneys who filed it.

Facts alleged to support these allegations include email records from the Kerry-Edwards Campaign, FEC records confirming Ms. Reardon's employment by the Kerry-Edwards Campaign, Defendant John Kerry's public statements regarding Defendants' conduct, and numerous public statements by Defendants confirming their purpose and intention to benefit the Kerry-Edwards Campaign by means of their conspiracy. Am. Comp. at ¶¶ 58-59, 65.

Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to Defendants Kerry-Edwards 2004, Inc. and John Kerry, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against these parties. *See Twombly*, 127 S. Ct. at 1964-65.

D. Plaintiffs Allege Facts Sufficient to State a Claim Against Reed Smith.

Plaintiffs allege that Defendant Reed Smith directly participated in Defendants' conspiracy by initiating proceedings to challenge Nader-Camejo's nomination papers in Pennsylvania, and by initiating attachment proceedings to seize \$61,638.45 from Mr. Nader's personal accounts in satisfaction of a judgment that was procured by means of a

fraud upon the court.⁵ Facts alleged to support these allegations include FEC records indicating that the DNC retained Reed Smith during the 2004 General Election, IRS records indicating that The Ballot Project reimbursed Reed Smith's co-counsel, and media reports and other public documents indicating that Reed Smith represents or has represented John Kerry and his wife, Teresa Heinz Kerry, in numerous matters. Am. Comp. at ¶¶ 70, 179-205. Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to Defendant Reed Smith, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against Reed Smith. *See Twombly*, 127 S. Ct. at 1964-65.

E. Plaintiffs Allege Facts Sufficient to State a Claim Against SEIU.

Plaintiffs allege that Defendant SEIU directly participated in Defendants' conspiracy by orchestrating, in conjunction with Defendant ACT, a coordinated campaign to sabotage Nader-Camejo's Oregon nomination papers, and by engaging in other unlawful acts to deny Nader-Camejo ballot access in Oregon, including hiring a law firm and private detectives that made false threats to Nader-Camejo Campaign petitioners. Am. Comp. at ¶¶ 166-178. In addition, although SEIU objects that "the amended complaint does not allege that SEIU was responsible for or had any role in any civil action brought against the Nader-Camejo campaign," SEIU Mot. at 11, SEIU moved to intervene as a party to proceedings to deny Nader-Camejo ballot access in Oregon. *See Kucera v. Bradbury*, 97 P3d 1191 (2004).⁶ That motion was denied, but SEIU was permitted to appear as *amicus curiae*. Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement

⁵ See note 3, *supra*.

could be inferred with respect to Defendant SEIU, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against SEIU.⁷ *See Twombly*, 127 S. Ct. at 1964-65.

F. Plaintiffs Allege Facts Sufficient to State a Claim Against ACT.

Plaintiffs allege that Defendant ACT directly participated in Defendants' conspiracy by orchestrating, in conjunction with Defendant SEIU, a coordinated campaign to sabotage Nader-Camejo's Oregon nomination papers, and by engaging in other unlawful acts to deny Nader-Camejo ballot access in Oregon. Facts alleged to support these allegations include a written statement by a former ACT employee, who provided a detailed description of the specific manner in which "the higher echelons" ACT and SEIU management jointly planned to sabotage Nader-Camejo's nomination papers. Am. Comp. ¶ 171. In addition, an ACT spokesperson publicly stated that the organization would "mobilize to make sure [Nader-Camejo] doesn't get on the ballot." *Id.* at ¶ 69. Accordingly, because Plaintiffs allege facts sufficient to suggest that discovery will reveal evidence from which an illegal agreement could be inferred with respect to Defendant ACT, Plaintiffs allege facts sufficient to state a claim for civil conspiracy against ACT. *See Twombly*, 127 S. Ct. at 1964-65.

III. Plaintiffs State Claims for Abuse of Process and Malicious Prosecution.

⁶ The Court may take judicial notice of such proceedings. *See Hinton v. Shaw Pittman Potts & Trowbridge*, 257 F. Supp. 2d 96, 100 n.5 (D.D.C. 2003)

⁷ SEIU takes exception to Plaintiffs' allegation that the union donated \$1 million to the DNC in 2004. *See* SEIU Mot. at 19, n.13. Although SEIU notes that such donation would be in violation of federal election law, which prohibits donations to national political parties, 2 U.S.C. § 441b(a), it is unclear whether SEIU actually denies the allegation. Nevertheless, a press release SEIU issued on November 1, 2004, with the headline "Anatomy of an Election Strategy: The Facts on SEIU's Role in Bringing Home a Victory for America's Working Families," states that "SEIU gave \$1 million to the DNC." Lest this claim be mistaken for a typographical error, a document attached to the press release, entitled "SEIU's Involvement in 2004 Progressive Political Organizations," reaffirms that "SEIU contributed \$1,000,000 to fund various DNC activities." Both documents are available on SEIU's website. *See* SEIU Media Center, available at http://seiu.org/media/pressreleases.cfm?pr_id=1201, last visited March 30, 2008. The Court may take judicial notice of newspaper articles and other public information. *See Heliotrope General, Inc. v. Ford Motor Co.*, 189 F. 3d 971, 981 (9th Cir. 1999).

In recognition of the truism that “the right to litigate is not the right to become a nuisance,” courts in the District of Columbia have long held that a cause of action will lie for “repeated abuse of [court] processes.” *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945), citing *Melvin v. Pence*, 130 F.2d 423 (D.C. 1942). In *Soffos*, the “repeated abuse” consisted of four lawsuits that Defendant allegedly initiated against Plaintiff maliciously and without probable cause. Defendant had filed only two lawsuits, but another party had filed two more, allegedly on Defendant’s behalf, and Plaintiff therefore sued Defendant, seeking “damages for the expense of defending the suits, injury to [Plaintiff’s] reputation,” and other damages. *Id.* The Court found that Plaintiff had stated a claim:

The burden of being compelled to defend successive unconscionable suits is not one which would necessarily result in all suits prosecuted to recover for like causes of action. The burden increases in more than arithmetical proportion. ... [S]uccessive suits may even wear a defendant down to the point of capitulation. We see no good reason why the law should tolerate repeated abuse of its processes. To allow redress for such abuse will not seriously hamper the honest assertion of supposed rights. No one is likely to be deterred from litigating an honest claim by fear that some future jury may erroneously decide that he has brought two suits maliciously and without probable cause.

Id. In considering whether to recognize a cause of action in *Soffos*, the Court was concerned to strike a balance “between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights.” The Court held, however, that causing four such “unconscionable suits” to be filed was sufficient grounds to sustain a cause of action. *Id.*

In *Soffos* and other early cases, District of Columbia courts did not distinguish between malicious prosecution and abuse of process. See, e.g., *Davis v. Boyle Bros., Inc.*, 73 A.2d 517 (D.C. 1950) (holding one “unconscionable suit” sufficient to sustain a cause of action). Now, however, the distinction is well-established: malicious prosecution refers

to the wrongful *initiation* of process, whereas abuse of process refers to the wrongful use of process *after* it has been properly issued. *See generally* 1 AM. JUR. 2D *Abuse of Process* § 3 (1994). Often, as in the case at bar, the same set of facts gives rise to a cause of action for both torts. *See Williams v. City Stores Co.*, 192 A.2d 534, 537 (D.C. 1963), *citing Hall v. Field Enterprises*, 94 A.2d 479, 481 (D.C. 1959). Thus, where Defendants’ “repeated abuse of [court] processes” consists of not four but *twenty-four* complaints they caused to be filed in eighteen state courts, as well as five complaints before the FEC, Plaintiffs’ Amended Complaint states claims for both malicious prosecution and abuse of process.

A. Plaintiffs State a Claim for Abuse of Process.

Abuse of process is defined as a “perversion of court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to do some collateral thing which he could not legally and regularly be compelled to do.”⁸ *Field Enterprises, Inc.*, 94 A.2d at 481; *see Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980); *Chatterton v. Janousek*, 280 F.2d 719 (D.C. 1960); *Hall v. Hollywood Credit Clothing Company*, 147 A.2d 866 (D.C. 1959). “The critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law.” *Morowitz*, 423 A.2d at 198; *Bown v. Hamilton*, 601 A.2d 1074, 1079 (D.C. 1992); *see also Heck v. Humphrey*, 512 U.S. 477, 486 n.5

⁸ Plaintiffs agree with Defendants that no conflict of law issue exists with respect to Plaintiffs’ abuse of process claims, and that the Court therefore should apply District of Columbia law. *See, e.g., Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz. App. 1982) (defining abuse of process); *Sundeen v. Kroger*, 133 S.W.3d 393, 398 (Ark. 2003) (same); *Blue v. Weinstein*, 381 So. 2d 308, 311 (Fl. App. 1980) (same); *Withall v. Capitol Federal Savings of America*, 508 N.E.2d 363, 368 (Il. App. 1987) (same); *Sarvold v. Dodson*, 237 N.W.2d 447, 449 (Iowa 1976) (same); *Moore v. Michigan National Bank*, 117 N.W.2d 105 (Mich. 1962) (same); *Weststar Mortgage Corporation v. Jackson*, 61 P.3d 823 (N.M. 2002) (same); *Yaklevich v. Kemp, Schaeffer & Rowe Company*, 626 N.E.2d 115, 118 (Oh. 1994) (same); *Pfaendler v. Bruce*, 98 P.3d 1146,

(1994); *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1997). To state a claim for abuse of process, therefore, a plaintiff must allege 1) that defendant perverted the judicial process to achieve a purpose not contemplated in the regular prosecution of the charge, and 2) that defendant had an ulterior motive. *Hollywood Credit Clothing Company*, 147 A.2d at 868; *Geier v. Jordan*, 107 A.2d 440 (D.C. 1954); *Field Enterprises, Inc.*, 94 A.2d at 480.

Plaintiffs have clearly pled each of these elements. As to the first, Plaintiffs allege that Defendants caused twenty-four complaints to be filed against their political competitors in eighteen states in the months immediately preceding the 2004 General Election, “not to vindicate valid claims, but to use the sheer burden of litigation itself as a means to bankrupt and disrupt” their competitors’ campaign. Am. Comp. ¶ 62. In so doing, Defendants perverted the process for challenging candidates’ qualifications for public office by using that process as a means *to prevent qualified candidates* from running for public office. As to the second element, Plaintiffs allege that Defendants’ ulterior motive was to help their preferred candidates win the 2004 presidential election by bankrupting a competing campaign, and thereby denying voters the choice of voting for their competitors. *Id.* at ¶ 4. Such motive is “ulterior,” because Defendants claimed, and still do claim, that their intention was only to ensure that Nader-Camejo complied with state election laws, when in fact, their motive was *to ensure that Nader-Camejo did not comply* with such laws.

No only do Plaintiffs plead the elements necessary to state a claim for abuse of process, but their allegations describe precisely the sort of “repeated abuse of [court]

1152 (Or. App. 2004) (same); *Simkins Industries, Inc. v. Fuld & Co.*, 392 F. Supp. 126, 130 (E.D. Pa. 1975) (same); *Brownsell v. Klawitter*, 306 N.W.2d 41, 44 (Wis. 1981) (same).

processes” that District of Columbia courts have long recognized as actionable. *See Soffos*, 152 F.2d at 683. Thus, District of Columbia courts recognize that abuse of process claims may arise “not based on the particular steps [defendant] took...[but] on the overall legitimacy of [defendant’s] strategy.” *Neumann v. Vidal*, 710 F.2d 856, 861 (D.C. Cir. 1983). In such cases, where “no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm,” courts hold that the “cumulative effect” of such conduct is actionable. *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984). This is precisely what Plaintiffs allege: that Defendants’ entire nationwide litigation strategy was illegitimate, because its cumulative effect was intended to bankrupt the Nader-Camejo Campaign and to prevent Nader-Camejo from running for office. *See Neumann*, 710 F. 2d at 861; *Page*, 729 F. 2d at 821-22. This is a paradigmatic case of abuse of process. *See Whelan v. Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (holding that “intentionally causing severe financial injury through the prosecution of legal proceedings” is an abuse of process).

In light of the foregoing, Plaintiffs’ allegations are clearly sufficient to survive Defendants’ motions to dismiss. *Compare, e.g., Whelan*, 953 F.2d 663 (reversing dismissal where plaintiff alleged that defendant fabricated charges in complaint filed in order to harm plaintiff’s business); *Neumann*, 710 F.2d 856 (reversing dismissal where plaintiff alleged that defendant brought patent dispute in order to scare off plaintiff’s investors); *Williams*, 192 A.2d 534 (reversing dismissal where plaintiff alleged defendant used attachment process to collect invalid debt); *Hollywood Credit Clothing Co.*, 147 A.2d 866 (same); *with Bown*, 601 A.2d 1074 (upholding dismissal where plaintiff alleged that defendant landlord brought suit for possession in order to take possession of house);

Morowitz, 423 A.2d 196 (upholding dismissal where plaintiff alleged that defendant filed a counterclaim); *Field Enterprises*, 114 A.2d 840 (upholding dismissal where plaintiff alleged that defendant used process to collect an unpaid debt); *Geier*, 107 A.2d 440 (upholding dismissal where plaintiff alleged that defendant used process to recover rent paid in reliance on plaintiff's fraud).

Accordingly, Plaintiffs state a claim for abuse of process.

B. Plaintiffs State a Claim for Malicious Prosecution.

Plaintiffs also state a claim for malicious prosecution.⁹ To state such a claim, a plaintiff must allege four elements: 1) the underlying suit terminated in plaintiff's favor; 2) malice on the part of defendant; 3) lack of probable cause for the underlying suit; and 4) special injury occasioned by plaintiff as the result of the original action. *See Morowitz*, 423 A.2d at 198, *citing Ammerman v. Newman*, 384 A.2d 637 (D.C. 1978). Plaintiffs have clearly pled all four elements.

Plaintiffs allege that Defendants caused twenty-four complaints in eighteen state courts and five FEC complaints to be filed against the Nader-Camejo Campaign, and that the proceedings terminated in Plaintiffs' favor in every state except Arizona, Illinois, Ohio, Oregon and Pennsylvania, and that the FEC took no action with respect to each of Defendants' five complaints. Am. Comp. ¶ 71. Accordingly, Plaintiffs allege facts sufficient to establish the first element of favorable termination.

Plaintiffs further allege that Defendants caused the aforementioned complaints to be filed "in a deliberate attempt to use the sheer burden of litigation itself as a means to

⁹ A potential conflict of law exists with respect to Plaintiffs' malicious prosecution claims, because the District of Columbia requires "special injury" as an element of the tort, whereas many other jurisdictions only require plaintiffs to plead damages. For purposes of the following discussion only, Plaintiffs assume that District of Columbia law will apply, and accordingly treat "special injury" as an element of the tort.

prevent Mr. Nader from running for public office,” and that Defendants’ intention was “to deny Plaintiff-voters and others the choice of voting for [Nader-Camejo].” Am. Comp. at ¶¶ 2, 45. Defendants therefore evinced a “willful, wanton, reckless or oppressive disregard to the rights of the plaintiff[s],” which is the very definition of malice. *Ammerman*, 384 A.2d at 641; *Tyler v. Cent. Charge Serv., Inc.*, 444 A.2d 965, 969 (D.C. 1982). Accordingly, Plaintiffs allege facts sufficient to establish the second element of malice. *See Tyler*, 444 A.2d at 969 (the determination of malice is “exclusively for the factfinder”).

Whether Defendants had probable cause for initiating legal proceedings against Plaintiffs is a mixed question of law and fact. *See Smith v. Tucker*, 304 A.2d 303, 306 (D.C. 1973) (“The existence of the facts [is] for the jury, but their effect when found is a question for the determination of the court”) (citations omitted). The question in the case at bar, however, is not a close one. In a civil action for malicious prosecution, probable cause is defined as the existence of “facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper.” *Id.* at 639-40. Plaintiffs allege that Defendants decided to initiate proceedings against Mr. Nader before he had even announced his candidacy. Am. Comp ¶ 1. Thus, it is not merely *improbable* that Defendants believed their litigation to be “legally just and proper,” but actually *impossible* that they could have formed such belief prior to the existence of the nomination papers that they eventually filed suit to challenge. Moreover, once Nader-Camejo filed their nomination papers, the decision to challenge them was, at least in some cases, made by DNC officials who had no basis for believing that such

litigation was legally just and proper. Am. Comp. ¶ 118. Accordingly, Plaintiffs allege facts sufficient to establish the third element of lack of probable cause.

Finally, Plaintiffs allege the requisite “special injury” on two alternative grounds. Special injury is injury that “would not necessarily occur in all suits prosecuted for similar causes of action.” *Tri-State Hospital Supply Corp. v. United States*, 2007 U.S. Dist. Lexis 48609, 15 (D.D.C. 2007), citing *Weisman v. Middleton*, 390 A.2d 996, 1000 (D.C. 1978). In the District of Columbia, however, courts also recognize that “being forced to defend multiple proceedings may constitute special injury.” *Id.*, citing *Weisman*, 390 A.2d at 1000; *Davis*, 73 A.2d at 520; *Soffos*, 152 F.2d at 685. In *Tri-State Hospital Supply Corp.*, the Court rejected Tri-State’s argument that the burden of defending itself in government-initiated penalty assessment and collection proceedings constituted special injury, because there was “no evidence that any unusual or exceptional procedures were employed...nor anything to suggest that the proceedings were longer or more onerous” than the usual case. *Id.* As previously established, however, the case at bar concerns “repeated abuse of [court] processes,” and therefore falls in line with *Soffos* and *Davis*, wherein the Court found that such repeated abuse satisfied the element of special injury. *See Soffos*, 152 F.2d at 683 (holding four separate proceedings sufficient to establish special injury); *Davis*, 73 A.2d at 520 (holding “one suit plus...something more than the usual suit brought maliciously and without probable cause” sufficient to establish special injury). Clearly, therefore, the twenty-four complaints Defendants caused to be filed in eighteen state courts are sufficient to establish special injury. *See id.*

Plaintiffs plead special injury on the alternative ground that Defendants induced Mr. Camejo to pay \$20,000 and initiated attachment proceedings in an effort to seize

\$61,638.45 from Mr. Nader's personal accounts, in satisfaction of a judgment which, Plaintiffs allege, was wrongfully procured by means of a fraud upon the court. Am. Comp. ¶¶ 181-207. Such injury not only "would not necessarily occur in all suits prosecuted for similar causes of action," *Tri-State Hospital Supply Corp.*, 2007 U.S. Dist. Lexis 48609, *15, but the injury Defendants inflicted upon Mr. Camejo and Mr. Nader appears to be unprecedented in the entire history of American jurisprudence. Certainly, Defendants have cited no case in which a candidate for public office has been ordered to pay litigation costs of any amount, let alone \$81,102.19, to private parties that sue to remove them from a state ballot. Plaintiffs therefore allege facts sufficient to establish the fourth element of such injury on two alternative grounds.

Accordingly, Plaintiffs state a claim for malicious prosecution.

IV. Plaintiffs' Claims Are Actionable.

A. Tortious Conduct in Furtherance of Defendants' Conspiracy Occurred Within the Limitations Period and Remains Ongoing.

Defendants concede that the conspirators' FEC actions were not resolved in Plaintiffs' favor until April 21, 2006, well within three years of the date that Plaintiffs filed their complaint, on October 31, 2007. According to Defendants' own position, therefore, Plaintiffs' claims are not time barred.

Additionally, the barrage of litigation that Defendants unleashed upon Plaintiffs, with the specific intention of causing them financial injury and other damages and violating their constitutional rights, continues to the present day in the form of attachment proceedings that Defendant Reed Smith initiated in an effort to seize \$61,638.45 from Mr. Nader's personal accounts, in satisfaction of a judgment that is without precedent in the history of American jurisprudence, and which, Plaintiffs allege, was wrongfully

procured by means of a fraud upon the court. Am. Comp. ¶¶ 181-207. Defendants' conspiracy thus constitutes a continuing tort, and Plaintiffs' claims are actionable on the alternative ground that wrongful acts in furtherance of the conspiracy remain ongoing. *See Jung v. Mundy, Holt & Mance, P.C.*, 372 F.3d 429, 433 (D.C. Cir. 2004), citing *Whelan v. Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992).

Courts in the District of Columbia hold that the "prosecution of a lawsuit can constitute a continuing tort." *Jung*, 372 F.3d at 433 (D.C. Cir. 2004), quoting *Whelan*, 953 F.2d at 673. This is because:

[A] lawsuit is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition. . . . A defendant subject to a lawsuit is likely to suffer damage not so much from the initial complaint but from the cumulative costs of defense and the reputational harm caused by an unresolved claim.

Id. The courts' rationale applies with even greater force in this case, where the tortious "chain of conduct" arises not from just one lawsuit, but from eighteen different lawsuits and five administrative proceedings, all initiated pursuant to a conspiracy to bankrupt the same adversarial party. *See Whelan*, 953 F.2d at 674 ("The commencement of a lawsuit is only the first link in a chain of conduct that does not end until the complaining party ceases prosecution of the suit"). In such cases, District of Columbia courts hold that the tortious conduct is actionable provided that at least one injurious act occurred within the limitation period. *See id.* at 673, citing *DeKine v. District of Columbia*, 422 A.2d 981, 988 n.16 (D.C. 1980) (stating elements of continuing tort); *see also Whelan*, 953 F.2d at 673 (statute of limitations on abuse of process claim begins to run not when abusive claim is asserted, but when it ceases to be asserted) (citation omitted).

Defendants here argue that Plaintiffs' claims are "time-barred," at the same time that their co-conspirators continue to assert the very claims that give rise to Plaintiffs' cause of action. Defendants cannot acquire a right to continue their tortious conduct, however, simply by arguing that Plaintiffs' claims arising from such conduct are time barred. *See Whelan*, 953 F.2d at 674; *Jung*, 372 F.3d at 434. Rather, courts applying the law of the District of Columbia in such cases hold that Plaintiffs are entitled to bring their claims so long as the continuing tort remains ongoing. To adopt a contrary rule "would have the perverse result of conferring on the tortfeasor the right to continue the tortious conduct and harm the victim anew." *Jung*, 372 F.3d at 434.

Because Plaintiffs have alleged facts that establish a continuing tort, as well as ongoing acts in furtherance thereof, Defendants' argument that Plaintiffs' claims are time barred is wrong as a matter of law. Am. Comp. ¶ 207 (citing payments from Defendant The Ballot Project, and from Defendant DNC, to co-conspirator law firms who continue to assert, as the true parties in interest, claims against Plaintiff). Moreover, as co-conspirators, Defendants are vicariously liable for injurious acts in furtherance of the conspiracy, *Halberstam*, 705 F.2d at 479, and Defendants may not avoid such liability by pleading the statute of limitations while such acts are ongoing. *See Whelan*, 953 F.2d at 674; *Jung*, 372 F.3d at 434.

B. Defendants Fraudulently Concealed Their Conduct.

Defendants' argument that Plaintiffs' claims are time barred also fails because Plaintiffs allege fraudulent concealment by the conspirators. Am. Comp. at ¶¶ 66-67; *see generally Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981) ("fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of

action from the plaintiff, although any word or act tending to suppress the truth is enough”). An act of fraudulent concealment by one conspirator generally tolls the statute of limitations as to all co-conspirators, and also to the underlying substantive claims. *See Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989). A question of fact therefore exists with respect to the date on which Plaintiffs’ cause of action accrued. *See Jung*, 372 F.3d at 433 (statute of limitations begins to run “when the plaintiff is or should be aware that he or she is being injured by a continuing tort”), *quoting Beard v. Edmondson & Gallagher*, 790 A.2d 541, 548 (D.C. 2002). Accordingly, Defendants’ affirmative defense with respect to the statute of limitations is inappropriate to raise in a motion to dismiss, because “it is...likely that plaintiffs can raise factual setoffs.” *Richards*, 662 F.2d at 73 (“a responding party often imposes an undue burden on the trial court and impedes the orderly administration of the lawsuit when he relies on a motion to dismiss to raise such an affirmative defense”). Because Plaintiffs do in fact raise such “factual setoffs,” including allegations of fraudulent concealment that Defendants completely fail to address, Am. Comp. at ¶¶ 66-67, Defendants’ motions to dismiss must fail. *See Richards*, at 73 n.13, citing *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 235 (1959) (question of plaintiff’s diligence “cannot be decided at this stage of the proceedings,” on a motion to dismiss); *Jones v. Rogers Memorial Hospital*, 442 F.2d 773, 775 (D.C. Cir. 1971) (statute of limitations defense cannot be decided on a motion to dismiss “unless it appears beyond doubt” that plaintiff can prove no facts to entitle him to relief); *Houlihan v. Anderson-Stokes, Inc.*, 434 F. Supp. 1319, 1324 (D.D.C.1977) (issue of due diligence requires a finding of fact and thus is not suitable for determination on motion for judgment on the pleadings). The extent of financial cooperation among the

Defendants, in violation of federal election law, was not something Plaintiffs could have discovered until financial disclosures were made in FEC filings *after the conclusion of the 2004 election*. These facts raise issues that prevent the granting of a motion to dismiss on statute of limitations grounds. *See id.*

V. The Noerr-Pennington Doctrine Does Not Bar Plaintiffs' Claims.

Defendants urge the Court to find that their conduct in this case is protected by the First Amendment right to petition the government, and consequently, that it is subject to immunity under the *Noerr-Pennington* doctrine. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (extending *Noerr-Pennington* immunity to protect coordinated action in petitioning administrative agencies and courts). Defendants do not suggest that conspirators' acts of harassment, intimidation and sabotage are also protected under *Noerr-Pennington*, Am. Comp. at ¶¶ 67-71, but they assert that Plaintiffs can establish liability for those acts only by providing evidence that each conspirator's actions were specifically intended to further the wrongful conduct. *See N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 919 (1982).

Defendants argument tortures the law on which it relies. While *California Motor Transport* extended *Noerr-Pennington* immunity to protect coordinated action in petitioning the courts, the Court noted that First Amendment rights may not be used as a means or pretext for achieving "substantive evils," such as abuse of the petitioning process. *See California Motor Transport*, 404 U.S. at 515.

One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result.

Id. at 513. “[A]ctions of that kind,” the Court concluded, “cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’” *Id.* Thus, as the Court subsequently explained, *California Motor Transport* “held that the complaint showed a sham not entitled to immunity when it contained allegations that a group sought to harm its competitors by ‘instituting proceedings and actions...with or without probable cause, and regardless of the merits of the cases.’” *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 57 (1993), quoting *California Motor Transport*, 404 U.S. at 512.

The import of *California Motor Transport* is that Defendants in this case may not acquire absolute immunity for their conduct merely by asserting that it is petitioning activity, and therefore protected as a form of political expression. *See California Motor Transport*, 404 U.S. at 513. As the Court noted, the true nature of Defendants’ conduct is a question of fact, and “what the proof will show is not known.” *Id.* at 515. For purposes of a motion to dismiss, however, Plaintiffs’ allegations must be taken as true, and these allegations, “on their face...come within the “sham” exception in the *Noerr* case, as adapted to the adjudicatory process.” *Id.* at 515-16; *see also Pendleton Const. Corp. v. Rockbridge County, Virginia*, 652 F. Supp. 312, 319 (W.D. Va. 1987) (*California Motor Transport* “suggested that the sham exception would encompass other unethical conduct in the setting of the adjudicatory process such as bribery, perjury, misrepresentation, or the bringing of baseless, repetitive claims amounting to abuse of process”).

Defendants’ reliance on *Claiborne Hardware* to shield themselves from liability for conspirators’ acts of harassment, intimidation and sabotage is also unfounded. In *Claiborne Hardware*, a group of merchants sued two civil rights groups and several

individuals in tort for lost earnings the merchants sustained over the course of a boycott that the groups and individuals had organized. *See Claiborne Hardware*, 458 U.S. 886. The Mississippi Supreme Court held the entire boycott unlawful, and imposed joint and several liability on the groups and individuals for all damages resulting from the boycott. *See id.* The Supreme Court reversed, holding that the state could not impose liability on individuals based on nothing more than their association with a group. *See id.* at 918-20.

Defendants misread *Claiborne Hardware* to hold that a conspirator cannot be held liable for wrongful acts in furtherance of a conspiracy unless the conspirator specifically intended the wrongful act “according to the strictest law.” *Claiborne Hardware* does not stand for this rule. Rather, *Claiborne Hardware* holds that, to impose liability on individuals based *only* on their association with a group, evidence must indicate that they have a specific intent to further the group’s unlawful goals. *See Claiborne Hardware*, 458 U.S. at 919-20. *Claiborne Hardware* is therefore plainly inapplicable. Defendants’ liability in this case is not premised upon their mere association with a group, but rather derives from their conduct in furtherance of an unlawful conspiracy. As such, Defendants are vicariously liable for damages caused by acts in furtherance of that unlawful conspiracy. *Halberstam*, 705 F.2d at 479.

VI. The Rooker-Feldman Doctrine Does Not Bar Plaintiffs’ Claims.

Defendants argue that Plaintiffs’ claims should be dismissed pursuant to the *Rooker-Feldman* doctrine. As an initial matter, two recent decisions of the Supreme Court emphasize the narrow scope of the *Rooker-Feldman* doctrine, which has been extended “far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress’ conferral of federal-court jurisdiction concurrent with jurisdiction exercised by

state courts, and superseding the ordinary application of preclusion law.” *Lance v. Dennis*, 546 U.S. 459, 464 (2006) (reversing dismissal on *Rooker-Feldman* grounds), quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005) (same). Indeed, the Supreme Court noted that it had applied the doctrine only twice, in the two cases from which the name derives. *Exxon Mobil Corp.*, 544 U.S. at 283, citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). To the extent that Defendants attempt to extend the *Rooker-Feldman* doctrine beyond its proper application as announced in those two cases, therefore, their argument must be rejected. *See id.*

In *Exxon*, the Court held that the *Rooker-Feldman* doctrine “is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp.*, 544 U.S. at 284. The doctrine is therefore plainly inapplicable to the present case. Plaintiffs do not seek review by this Court of the eighteen state court proceedings in which Defendants and their co-conspirators challenged Nader-Camejo nomination papers in the 2004 general election, nor do Plaintiffs seek rejection of those state court judgments. Rather, Plaintiffs seek damages arising from Defendants’ unlawful conspiracy to cause Plaintiffs financial injury and other damages by initiating groundless and abusive litigation against them in eighteen state courts. Am. Comp. at ¶ 1.

In *Feldman*, the Court noted that federal courts are prohibited from exercising jurisdiction over issues actually decided by a state court, as well as those issues that are

“inextricably intertwined with the questions ruled upon by a state court.” *Feldman*, 460 U.S. at 483. Defendants assert that Plaintiffs’ claims are “inextricably intertwined” with the state court decisions on the merits of the Nader-Camejo nomination papers, but they provide no support for the claim. Federal courts, however, have clarified that federal claims are “inextricably intertwined” with a state court decision only “if success on the federal claim depends upon a determination that the state court wrongly decided the issues before it.” *See Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202-03 (4th Cir. 1997). Plaintiffs’ claims do not depend in any way upon such a determination, and Defendants have not asserted that they do. Accordingly, the *Rooker-Feldman* doctrine does not bar Plaintiffs’ claims. *See id.*

VII. Plaintiffs Have Standing to Bring Their Claims.

Defendants argue that Plaintiffs do not have standing to bring their claims. As a preliminary matter, this argument consists largely of objections to factual allegations which, for purposes of Defendants’ motions to dismiss, the Court must accept as true. *See Zinnermon*, 494 U.S. at 118. Furthermore, Defendants fail to address Plaintiffs’ allegations that the conspiracy caused Mr. Camejo at least \$20,000 in damages, and that the conspiracy has placed Mr. Nader in imminent jeopardy of losing \$61,638.45. Am. Comp. at ¶ 229. These errors and omissions render much of Defendants’ standing argument inapplicable.

Plaintiffs clearly have standing as voters and candidates who personally suffered damage.¹⁰ Defendants erroneously assert that Plaintiff-voters lack standing because they assert only a “generalized grievance.” Thus, Defendants assert that nothing distinguishes

the voter Plaintiffs from all other voters in the seventeen states that denied Nader-Camejo ballot access in 2004. The superficial appeal of this assertion fades, however, when examined in the context of Plaintiffs' actual allegations: Plaintiffs do *not* allege that Defendants attempted to deny *all* voters their preferred choice of candidates, but only those voters who wished to vote for the Nader-Camejo ticket. Am. Comp. at ¶ 1. Moreover, Defendants specifically targeted this discrete minority of voters precisely *because* they wished to vote for Nader-Camejo. As members of the targeted class of voters, therefore, Plaintiff-voters do not allege a generalized grievance, but rather, a concrete injury specific to the minority of voters who wished to vote for Nader-Camejo in the 2004 general election. *Compare Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (voters who live within racially gerrymandered voting district have standing to challenge legislation that created the district); *with United States v. Hays*, 515 U.S. 737, 738 (1995) (voters who do not live within racially gerrymandered district do not have standing to challenge legislation that created the district).

Defendants next assert that Defendants did not cause Plaintiffs' harm, because Defendants did not cause any state officer to deny Mr. Nader and Mr. Camejo ballot access, and because Defendants did not cause Mr. Nader to loan \$100,000 to his campaign. Here, Defendants simply deny allegations that must be taken as true for purposes of ruling upon the motion to dismiss. Plaintiffs allege that Defendants conspired to cause them concrete and specific harm, and that Defendants did in fact cause such harm. Defendants offer alternative theories of causation to explain Plaintiffs' harm, but these alternative theories simply are not relevant. *See Friends for Ferrell Parkway v.*

¹⁰ On March 7, 2008, a related case Plaintiffs filed in the District Court for the Eastern District of Virginia was transferred to this Court, and Plaintiffs expect it to be consolidated with the case at bar. The transferred

Stasko, 282 F.3d 315, 324 (4th Cir. 2002) (“the “fairly traceable” standard is not equivalent to a requirement of tort causation”).

Finally, Defendants assert that Plaintiffs’ alleged harms are not redressable. Plaintiffs allege that Defendants caused them financial injury and other damages by means of a conspiracy to pursue unfounded and abusive litigation against Plaintiffs, and that acts in furtherance of the conspiracy are ongoing. Notwithstanding Defendants’ persistent denial of these allegations, which must be taken as true, Plaintiffs have standing based upon these allegations alone.

VIII. Plaintiffs’ Request for Injunctive Relief Is Not Moot.

Defendants argue that Plaintiffs’ request for injunctive relief is moot because the 2004 election has ended, thereby preventing the Defendants from engaging in the alleged violations that the requested injunctive relief would prevent. Defendants also argue that the “capable of repetition, yet evading review” exception does not apply, but they simply misstate the legal issue. The relevant question is not whether the 2004 election might recur, but whether Defendants’ wrongful conduct during that election might recur. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Because such conduct “truly could be capable of repetition, yet evading review,” Plaintiffs’ claims are not moot. *Roe v. Wade*, 410 U.S. 113, 124-25 (1973); *see Honig v. Doe*, 484 U.S. 305, 318-19 n.6 (a “reasonable expectation” or recurrence suffices to avoid mootness, even if there is no “demonstrated probability” of the conduct recurring).

In addition, an action for injunction does not become moot merely because the conduct immediately complained of has terminated, if there is a sufficient possibility of a recurrence that would be barred by a proper decree. *See United States v. Concentrated*

action includes claims brought under 42 U.S.C. § 1983 to vindicate Plaintiffs’ constitutional rights.

Phosphate Export Ass'n, 393 U.S. 199 (1968). Here, Plaintiffs allege that Defendants incorporated a Section 527 organization called The Ballot Project specifically for the purpose of coordinating and financing a conspiracy to sue Plaintiff Ralph Nader's presidential campaign, and that the organization did in fact do so. Am. Comp. at ¶¶ 5, 60. A sufficient possibility therefore exists that such conduct will resume now that Mr. Nader has announced that he is running for office again.¹¹ Accordingly, Plaintiffs' request for injunctive relief is not mooted by Defendants' voluntary cessation. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (plaintiffs' claims not moot where defendant was "still incorporated" and "could again decide" to engage in offending conduct); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1983) ("[d]efendants face a heavy burden to establish mootness" in voluntary cessation cases "because otherwise they would be "free to return to [their] old ways" after the threat of a lawsuit had passed"), quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Finally, Defendants assert that Plaintiff-voters only request injunctive relief, and that consequently they should be dismissed from the case. McAuliffe Mem. at 27. This argument is wrong as a matter of fact and as a matter of law. Plaintiff-voters seek damages for the deprivation of their constitutional rights, and they are entitled to such recovery. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed"). Accordingly, Defendants' argument must fail, because Plaintiff-voters' claims are not moot.

¹¹ The Court may take judicial notice of newspaper articles and other public information. *See Heliotrope General, Inc.*, 189 F. 3d at 981 (9th Cir. 1999).

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

Dated: March 31, 2008

Respectfully Submitted,

/s/ Oliver B. Hall

Oliver B. Hall
D.C. Bar No. 976463
1835 16th Street, N.W.
Washington, D.C. 20009
(617) 953-0161
oliverbhall@gmail.com

Counsel for Plaintiffs

Bruce Afran, Esquire
10 Braeburn Drive
Princeton, NJ 08540
Of Counsel

Mark R. Brown, Esquire
303 East Broad Street
Columbus, OH 43215
Of Counsel

Carl J. Mayer, Esquire
Mayer Law Group, LLC
1040 Avenue of the Americas, Suite 2400
New York, NY 10018
Of Counsel

Gonzalez & Leigh, LLP
Matt Gonzalez, Esquire
G. Whitney Leigh, Esquire
Bryan Vereschagin, Esquire
Two Shaw Alley
San Francisco, CA 94105
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2008, I electronically served a copy of the foregoing Response in Opposition to Defendants' Motions to Dismiss by means of the Court's CM/ECF system, or by first class mail, upon the following parties:

Joseph E. Sandler
D.C. Bar No. 255919
John Hardin Young
SANDLER, REIFF & YOUNG
50 E Street, S.E. #300
Washington, D.C. 20003

*Attorneys for Defendants Democratic
National Committee, Terry McAuliffe
and Jack Corrigan*

Lawrence Noble
D.C. Bar No. 24434
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM, LLP
1440 New York Ave., N.W.
Washington, D.C. 20005-2111

*Attorneys for Defendants
Toby Moffett, Robert Brandon,
Elizabeth Holtzman, Steven Raikin
and The Ballot Project, Inc.*

Laurence E. Gold
D.C. Bar No. 336891
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W., Suite 500
Washington, D.C. 20009

Lyn Utrecht
D.C. Bar No. 272666
RYAN, PHILLIPS, UTRECHT
& MACKINNON
1133 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for America Coming Together

Michael B. Trister
D.C. Bar No. 54080
LICHTMAN, TRISTER & ROSS, PLLC
1666 Connecticut Ave., N.W., Suite 500
Washington, D.C. 20009

*Attorneys for Defendant Service Employees
International Union*

Mark E. Elias
D.C. Bar No. 442007
PERKINS COIE
607 14th St., N.W.
Washington, D.C. 20005

*Attorneys for Defendants Kerry-Edwards
2004, Inc. and Senator John Kerry*

Douglas K. Spaulding
D.C. Bar No. 936948
REED SMITH, LLP
1301 K Street N.W.
Suite 1100 – East Tower
Washington, D.C. 20005

Attorneys for Defendant Reed Smith, LLP

/s/ Oliver B. Hall
Oliver B. Hall